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Cabell, Hartwell

Increase of hazard

[New York]

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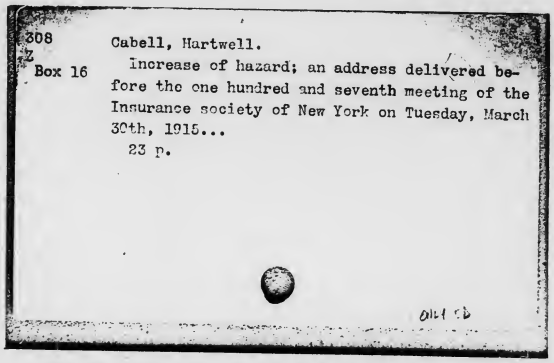

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Increase of Hazard

AN ADDRESS

Delivered before the One Hundred and Seventh Meeting

OF

The Insurance Society of New York

ON

Tuesday, March 30th, 1915

BY

Mr. Hartwell Cabell

OF

Cabell & Gilpin

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Increase of Hazard.

When your president spoke to me, some time ago, about writing a paper upon the subject of "Hazards," I did not at first take it seriously. As the result of a recent law suit, with which some of you are familiar, I had reached the conclusion that if there was one lawyer in New York who knew nothing about the word "hazard," as used in insurance policies, that lawyer was myself.

In the case in question I took the stand that if an owner of a building should employ another person to set it on fire, and should put him on a train, headed in the right direction, with a round trip ticket, expense money, a plan of the property and a box of matches, that building was in greater danger from fire than it had been before; in other words, that the "hazard had been increased." I seriously believed I was right. You may imagine my feelings when I was told that the hiring of incendiaries, the purchase of their railroad tickets, the drawing of plans and supplying them with matches were mere psychological phenomena, reprehensible in themselves perhaps, but not to be taken seriously. Especially would this seem to be the case where the only motive back of them was to compel a few predatory corporations, foreign and otherwise, to give up some thousands of dollars of their surplus gains.

The learned judges did not go quite so far as to say that a building was entirely safe under these circumstances, but the effect of the decision was to seriously shake my confidence in myself as an expounder of the meaning of insurance terms.

With the warning that, in the circumstances, my opinion on insurance matters is to be taken with a grain of salt, I take pleasure in laying before you what I conceive to be the principles which should govern the interpretation of the policy provision against "increase of hazard."

In determining the rules which should guide us, I shall not attempt to square my deductions with all the decisions. While as to certain aspects of the question the cases are fairly in accord, they are upon other points hopelessly irreconcilable, and we are left to choose between two or more widely divergent views.

The New York Standard policy provision reads:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured."

At the outset it, is to be remarked that the language used creates what is technically known as a condition subsequent. The practical importance of this is that while in cases of conditions precedent, such as furnishing proofs of loss, and submitting to appraisal, and examinations under oath, the burden is upon the insured to show that he has complied with them, in order to establish his right of action under the policy; the opposite rule pertains as to conditions subsequent. There, the company has the burden of alleging and proving, as a substantive defense, the breach of the condition upon which it relies as a defense to an action upon the policy.

Warranties and conditions addressed to hazards are of the greatest importance from the standpoint of the underwriter.

The idea of "Constancy of Hazard" may be said to lie at the basis of contracts of fire insurance. The rate of premium to be paid is usually fixed at the beginning of the term, and is determined by the degree of hazard as then known and disclosed to the insurer. If, after the policy goes into effect, this hazard or chance of fire increases, the insured has in most instances either saddled the company with a risk it would not knowingly assume, or else he is getting something for which he has not paid. In either case, when the change in circumstances comes to pass, either by his own act or within his knowledge, good faith which lies at the basis of all insurance requires that he make disclosure and give the insurer the opportunity to either increase the premium or cancel the policy. His silence under the circumstances would in many cases amount to a fraud, either actual or constructive.

Fire underwriters, from the earliest times, have sought to protect themselves from a change in hazard during the life of the policy by various warranties and conditions inserted in their contracts. A form in use in England in the early part of the 19th Century read:

"If a building shall at any time be in the possession of or let to any person who shall use or exercise therein, any hazardous trade, or shall be made use of in the storage of any hazardous goods, * * * unless due notice of such circumstances be given to the corporation and mention thereof is made in the

policy itself, or be allowed by endorsement thereon, and the rate for such extraordinary hazard duly paid, the policy shall likewise be null and void in respect of such building and the goods therein."

Another early example is to be found in a policy issued by the Protector Fire Insurance Co. (about 1850):

"If after the insurance shall have been effected, the risk shall be increased by the erection or alteration of any stove; the carrying on of any hazardous trade, operation or process; the deposit of any hazardous goods or hazardous communication; the insured will not, except under the consent of the directors and on the terms they may impose, be entitled to any benefit under his policy."

The Massachusetts Standard form of today reads:

"This policy shall be void, if without some assent (that of the company printed or in writing) the situation or circumstances affecting the risk shall by or with the knowledge, advice agency or consent of the insured, be so altered as to cause an increase of such risk."

In the New York Standard form, Fraud is the subject of an entire paragraph (lines 7 to 10 inclusive). There follows the paragraph (lines 11 to 30), in which are grouped various contingencies, among them that which we are considering, the happening of any one of which will avoid the policy. Broadly speaking, this entire paragraph treats of hazards which the insurer is unwilling to underwrite, at least at the rate of premium recited in the policy. While the provision against assignment of the policy before loss may be said in one view to be merely a recognition of the purely personal character of the contract, yet even that element has its bearing upon the moral hazard. The purpose of the other clauses is clear. Other insurance, chattel mortgages, and the commencement of foreclosure proceedings, are made grounds for forfeiture clearly because they tend to increase the moral hazard. The requirement that the interest of the assured shall be sole and unconditional ownership in fee simple, is also directed to the moral hazard, and the prohibition of any change in such interest is intended to stabilize the moral hazard during the life of the policy.

The clauses prohibiting the operation of factories at night, the extended employment of mechanics on the premises, the storage of explosives, and the vacancy clause, are all clearly meant to guard against any increase of the physical hazards of the risk.

As compared with the Standard form, the clauses dealing with hazards in the very early policy forms were comparatively simple. In many instances no specific hazards were mentioned, the clause being general in its terms. In others, there were specific prohibitions, such as the prohibitions against the erection or alteration of stoves, the carrying on of hazardous trades and the deposit of hazardous goods found in the Protector Policy already referred to.

Not the least interesting phase of the study of insurance law, is a historical examination of the development of the old and comparatively simple policy provisions into the form as we find it in modern policies.

In a recent decision *(Supreme Judicial Court of Maine in Knowlton v. Insurance Co., 35 Ins. L. J. 81)*, the highest court of one of our states, in complimentary language, ascribes the clauses specifying the hazards which will avoid the policy, to the wisdom and foresight of the State Legislature. Recognizing the impossibility of anticipating or specifying the infinite variety of changes in the situation and circumstances of a risk that might cause an increase of hazard, the law makers are declared to have been able, in the light of experience, to select a number of specific instances and to provide for them.

The principal objection to this theory is that it isn't true. The gradual additions to the specific enumeration of hazards came, not from the legislative font of wisdom, but from the inherent objection on the part of underwriters to being "done," if I may be pardoned the use of the term.

Under the general clause providing that "any increase of hazard should avoid the policy," each case had to go to the jury. Even where the facts were undisputed, yet the jury was permitted to pass upon the question of "increase of hazard," under the rule that the conclusion to be drawn from the facts is as much within the province of the jury as the ascertainment of the facts themselves.

Needless to remark, the juries who from time immemorial have shown a generous and charitable disposition, and a natural desire to aid the unfortunate, where it could be done without cost to themselves, very generously refused to recognize as increases of hazard, things which the underwriters, in the light of experience and by the lightening of their own pocketbooks, could regard in no other way.

Therefore it was that the companies, for self protection, from time to time selected those specific instances which occurred

the most frequently, and by making each the subject of a separate clause, took away from the jury the power to decide whether they were or were not increases of hazard, under the circumstances of each case.

In several jurisdictions, even the specific enumeration in the policy, of the hazards which should avoid it, was held not be enough to stay the hand of juries in their distribution of the assets of insurance companies upon eleemosynary lines. Admitting the fact of vacancy, or night operation or the storage of explosives, these courts held that the jury was still to determine whether the hazard was thereby increased. In the absence of some statute which would override the contract, these decisions were clearly wrong. It is undoubtedly the law that where the insurer has provided that the happening of a certain event, or the coming into existence of a certain fact shall avoid the policy, such a stipulation in the absence of statute is binding upon the parties; and where the event happens and the fact is undisputed, there is nothing left for the jury to determine, and the court declares the contract at an end as a matter of law.

The general clause we are considering has been retained in connection with the special clauses, for the obvious purpose of protecting the companies against instances of increase of hazard which either can not be foreseen, or which occur so seldom as not to justify the addition of further provisions to an instrument already too long.

The insertion of special clauses in addition to the general clause has one effect which it is important to bear in mind: Where a certain contingency is provided for by a special condition, this contingency is taken out of the general provision.

A rather interesting example of the application of this rule of construction is found in *Herrman v. Merchants Ins. Co. (81 N. Y. 184)*. The policy contained a condition avoiding the insurance in case the building became "vacant and unoccupied." The court defined the words as having each a separate meaning; the house being unoccupied when no one lived in it, but not being then necessarily vacant; while a house filled with furniture throughout, although unoccupied, would not be vacant, because the primary meaning of the word "vacant" is "empty." Therefore, the court refused to permit the company to show that non-occupancy increased the hazard, even though the premises were not vacant, on the ground that the company elected to consider non-occupancy as an increase of hazard only in connection with the vacancy of the premises, and that, therefore, the general con-

dition contained in the policy against "increase of hazard" would not apply.

The same principle is applied in cases where repairs are being made on the premises. The shavings and other refuse left by mechanics undoubtedly increase the hazard. So also the burning off of old paint by the use of a gasoline torch. But the language of the policy permitting, by inference, the employment of mechanics in the building, altering and repairing the same, for periods of not more than fifteen days, is held to prevent a forfeiture where the alterations and repairs are within the permission, even though they admittedly increase the hazard.

One sharp distinction is to be observed between defenses predicated upon the general provision against increase of hazards, and the specific clauses covering the explosives, vacancy, etc. While, as we have seen, cases arising under specific clauses, where there is no dispute as to the facts, present a mere question of law for the court, defenses based upon the alleged breach of the general provision present a question of fact always. It can never be said as a matter of law that any particular change in the condition of the property insured or any act or omission on the part of the owner or his agent increases the hazard. What constitutes an increase of hazard is always essentially a question of fact. *(Firemen's Ins. Co. v. Appleton Paper Co.; 101 Ill. 9; Halpin v. Ins. Co. of North America, 10 N. Y. St. Rep. 345).*

The clause against increase of hazard, while apparently simple upon a casual examination, is by no means free from difficulty when we come to apply its language to concrete cases. It says too much. It cannot be applied literally without depriving the assured of the very protection for which, under the general principles of insurance, he has contracted.

Take for example the phrase "within the knowledge *or* control of the assured." This language can not be enforced. If it were, the breaking out of a fire in neighboring premises at any time during the life of the contract would, if known to the insured, although beyond his control, automatically terminate the contract. Yet the loss of property from the spread of such a conflagration is one of the contingencies against which the policy is intended to protect the owner. So if after the issue of the policy the insured should learn of a conspiracy to burn his property, and if before he could take steps for his protection the property should be destroyed, he would be without relief against the company. Any number of similar hypothetical cases suggest themselves; where the hazard has been increased; where such

increase is either within the knowledge or control of the insured; and yet no defense based upon the provision we are discussing would prevail.

Considered in its entirety, however, and when construed from the standpoint of common sense, the effect of the general provision is far reaching. As pointed out by the Massachusetts court, in *Houghton v. Manufacturers Mutual Fire Ins. Co. (80 Metc. 114)*, such a provision binds the insured, not only not to make any alterations or changes in the structure or use of the property, but also prohibits the introduction of any practice, custom or mode of conducting business which would materially increase the risk, and prohibits the discontinuance of any precaution represented in the application to be adopted and practiced with a view to diminishing the risk. It is practically a stipulation that the mode of conducting the business in effect at the time of the issue of the policy shall be substantially observed, and the precautions against fire then being taken shall be substantially continued to be taken during the life of the policy.

A discussion of the clause to be of practical value must be based upon some definite plan. I have concluded that the best way is to group the cases and contrast the decisions as to each aspect of our subject, and where the decisions are not in accord, to try to draw from the best considered cases some rule which it will be fairly safe for underwriters and their adjusters to follow and which will at least have the support of reason and common sense.

The first thing to determine is what is meant by the words "increase of hazard." As a learned text writer on the subject of insurance says:

> "It must not be forgotten that hazard is of necessity a variable quantity. It changes constantly from day to day, and some times imperceptibly, from the operation of the laws of nature and from various circumstances beyond the control of the insured."

Strictly speaking every loss under the policy is preceded if only momentarily by an increase of hazard, otherwise there would have been no loss.

Therefore the policy must mean, not every increase of hazard, but those falling into one or more classes, more or less related, and excluding cases which although included by the literal meaning of the phrase "if the hazard be increased," are nevertheless to be considered as covered by the policy. To make myself clear, take for example the casual acts of negligence of the owner or

his servants, such as the use of coal oil to light fires, or the leaving of oil rags, exposed matches, or rubbish, on the premises. These acts or omissions undoubtedly increase the hazard and may be both within the knowledge and under the control of the insured, and yet are held to be included in the risk undertaken by the underwriter, and not such increases as will avoid the policy.

We may as a starting point ask; does the language in the policy refer to *temporary* increases of hazard, such as the storage of dynamite over night, or must there be some enhancement of the risk of a more or less stable and permanent character?

Looking at the question from still another standpoint, we may consider the increase of hazard with respect to the location of the danger with reference to the premises of the insured. My attention has been especially called by your Secretary, to cases where, in our modern loft buildings, the increase of hazard is claimed to arise from dangers located not in another building, but in the same building which contains the subject of insurance, but in premises entirely separate from the insured premises and occupied by a different tenant.

The clause may further be considered in so far as it relates to moral hazards other than those especially provided for in the policy.

Finally we should consider the meaning of the phrase "within the knowledge or control of the insured," as relating to "imputed" knowledge and control by agents.

(*a*)

Nowhere in the policy is there any distinction drawn between the permanent and temporary character of increase of hazard which will defeat recovery. Logically, a deliberate or permitted increase of hazard, when material, imposes a burden upon the insurer for which he has not been paid, whether the increase be permanent or temporary. The question is one of degree and not of kind. In no branch of the law does the old saw "Hard cases make bad law" cut deeper than in Insurance Law. Courts constantly evade logical conclusions and ignore the evident intention of underwriters in drafting their contracts, in their effort to avoid forfeiture in "hard cases."

Very early in the history of Fire Insurance, courts declined to predicate a forfeiture upon merely temporary conditions.

In *Dobson v. Sotheby (Moo. & M. 90)*, sometimes referred to as The Tar Barrel Case, and decided many years ago, the building had been insured at a very low rate of premium, only applicable on buildings where no fire was kept and no hazardous goods

were stored. A barrel of tar was brought into the building to be used in connection with repairs which were being made. The tar caught on fire and the building was destroyed. Lord Tenterden held that the prohibition against fire and the storage of hazardous goods meant fire habitually used and hazardous goods habitually deposited, and the mere incident of the tar barrel being there for the purpose of repairing the building, was not sufficient to avoid the policy.

In *Shaw v. Robberds (6 A. & E. 75)*, decided early in the 19th Century, the subject of insurance was a kiln which had been erected for drying wheat. A vessel loaded with bark sank in neighboring waters, and the owner of the kiln out of kindness permitted its use in drying out the bark after it had been taken from the sunken vessel. The policy provided that if any alteration were made either in the building or the business carried on therein, notice should be given to the insurers, who would endorse permission on the policy and receive additional premium; otherwise the policy should be void. The jury found as a fact that the drying of bark was a more dangerous business than drying wheat, thereby it would seem establishing a clear case of increase of hazard. The court held however that an isolated and temporary instance of increase was not in contemplation of the underwriters and did not avoid the policy.

In *Adair v. Ins. Co. (107 Ga. 297)*, the policy covered a dwelling house and contents. The husband and agent of the insured brought a threshing machine upon the premises temporarily, for the purpose of threshing some wheat. The work only required about two hours, but in that time a spark was blown by an unexpected gust of wind, in the direction of the house, which caught fire and was destroyed. In the lower court plaintiff was non-suited, but the supreme court of Georgia reversed the case holding that the question whether a breach of warranty had been committed by such a temporary and incidental use of the engine, was for the jury.

The case is wrong in principle. The action involved the construction of a written instrument. Under our laws, that is always for the court, not for the jury. In the two English cases I have cited the juries found the facts and the courts construed the language of the policy not to contemplate or include such facts. Whether right or wrong in their conclusion, the judges at least proceeded upon the right theory. But the Georgia Court practically left it to the jury to determine whether the increase of hazard resulting from certain admitted facts was or was not

within the prohibition of the warranty or condition of the policy: In other words, the jury and not the court was to construe the policy and ascertain the meaning of the language used by the underwriters.

In *Kenefick v. Ins. Society (36 Ins. L. J. 817)*, the Missouri Court refused to treat a temporary increase of hazard as not being within the policy condition against increase of hazard. Dynamite was stored in the building temporarily but had been removed by the firemen during the fire and did not contribute to the loss. In holding that the policy was forfeited the Court said:

> "If the appellant had known that the dynamite and other explosives were put, kept, or allowed in the building it would have cancelled the policy as quickly as possible * * *. That the storage of the explosives in the building by plaintiffs increased the risk and was a clear violation of the express provision of the contract of insurance, admits no doubt. By this act the policy was forfeited and the plaintiffs should have been nonsuited unless there was a waiver of the forfeiture."

Coming to the decisions of our own Courts:

In *Townsend v. Northwestern Ins. Co. (18 N. Y. 168)*, the policy provided that if after the insurance was effected the risk should be increased by any means whatever *within the control* of the assured, the insurance should be void. This language was held not to prevent ordinary repairs, and although a force pump was put out of commission for a short time while repairs were being made, and the risk thereby increased, yet such increase of hazard was declared not to be within the prohibition of the policy, provided the repairs were made with reasonable diligence.

In *Williams v. Peoples Fire Ins. Co. (57 N. Y. 274)*, the policy condition was that if the hazard be increased by any means whatever, *within the control* of the insured, the policy should be void. It appeared from the proof that the insured, for several months before the fire, kept upon the premises a jug of crude petroleum for medicinal purposes. It was shown that the petroleum was not the cause of the fire but evidence was given tending to show that its presence was dangerous and increased the hazard. The court below refused to charge that, as a matter of law, if the presence of the petroleum increased the risk the plaintiff could not recover. The Court of Appeals reversed the judgment for the assured, but held that it was a question of fact for the jury to determine whether the risk was actually or materially increased, and if it was, it avoided the policy. The language of Earle, J. in the opinion read by him directly bears upon the point we are discussing:

> "If the presence of the petroleum in the room where the insured property was, had been only casual or temporary, for some use connected with the store or the merchandise therein, or the occupants thereof, it would probably not have increased the risk within the meaning of the policy. But here it was kept permanently for five or six months."

Although there are several cases in other states which seem to recognize a temporary increase in the physical hazard as ground for forfeiture, the weight of authority is the other way. The general rule seems to be that there must be something in the nature of a permanent change either in the premises themselves or in the manner of their use, to justify a court in declaring the policy void for increase of physical hazard.

(*b*)

Taking up the question of location, and again referring to the language of the policy, there is nothing to indicate that there was any intention on the part of the underwriters to limit either the area within which the increase might arise, or the source from which it might originate. In order to invalidate the policy they must either be known to or under the control of the assured. Outside this limitation the only question was evidently intended to be, whether there had arisen some danger material and actual, and not contemplated by the parties when the rate was fixed and the contract entered into.

We may divide the authorities, for convenience, into those which deal with new dangers in and upon the premises insured; new dangers arising in premises owned and controlled by the insurer and lying near to or adjacent to the insured premises; those which occur in the same building, that is under the same roof, but in different premises occupied by persons other than the insured; and lastly those occurring in adjacent property, outside the building which is or contains the subject of insurance, and owned or used independently and by other persons.

Where the facts disclose a material increase of hazard originating in the premises insured and of the kind contemplated by the underwriters, in inserting the provision against increase, courts have almost unanimously decreed a forfeiture. In answering a hair splitting contention on the part of plaintiff's counsel

in such a case, Judge Ruger of the Court of Appeals said in *Mack v. Rochester German Ins. Co. (106 N. Y. 560):*

> "It tends to bring the law itself into disrepute, when, by astute and subtle distinctions, a clean case is attempted to be taken without the operation of a clear, reasonable and material obligation of the contract."

There has been little hesitation on the part of the courts in giving the underwriters the full benefit of their contract, where the assured himself has brought about an increase of hazard by erecting buildings and by other acts upon premises owned or controlled by him and lying adjacent to the insured premises.

In an early New York case, *Murdock v. Chenango County Mutual Ins. Co. (2 N. Y. 210),* the policy provided that if the risk be increased by any means within the control of the insured the policy should be void. The insured erected other buildings on the premises so as to increase the hazard and it was held he could not recover. Several other New York cases are to the same effect.

In the *Horan* case, *(89 Pa. St. 438),* the insured had increased the hazard of the building insured by erecting a dwelling house adjoining. He claimed however that by removing a carpenter shop which had theretofore adjoined the insured premises, he had evened things up and was entitled to recover, and the lower court took that view. On appeal it was held he could not set off one risk against another, and that since he had increased the hazard he could not recover. To the same effect is *Albion Lead Wks. v. Williamsburg City F. Ins. Co. (2 Fed. 479).*

It is when we come to consider cases where the new danger arises from the acts of other and independent owners or tenants that we find the courts inclined to narrow their construction of the policy.

The Texas Court of Appeals held that a stipulation against an increase of hazard should not be construed so as to cover risks created on adjacent property of independent proprietors who use their property in a legitimate manner. *(Sun Ins. Co. v. Texascana Co.)*

In a Colorado case, *(State Ins. Co. v. Taylor, (14 Colo. 449),* the court held that a clause providing that the policy should be void if the hazard be increased without the written consent of the company, was to be interpreted as applying only to the premises insured and adjacent property subject to the control of the insured, and must not be extended to cover the acts of contiguous owners. The Court said:

> "There is nothing in the language used which would extend it to the property not under his control and the acts of others, and hold him responsible for the acts of his neighbors or of contiguous owners, and requires him to keep informed as to the manner in which other persons in the neighborhood used their property or to communicate the facts to the insurer."

The New Hampshire Standard policy declares that the policy shall be void if without the assent of the insurer "the situation or circumstances affecting the risk, shall, by or with the knowledge of the insured, be so altered as to cause an increase of such risk."

The Supreme Court of that State held in *Janvrin v. Rockingham F. Mut. Ins. (70 N. H. 35),* that this language was broad enough to cover all such acts of neighbors done on their premises as would increase the hazard of the insured property, where known to the insured, even though such acts were not within his control.

Eager v. Firemen's Fund Ins. Co., decided by the General Term of the Supreme Court in the Fourth Department (71 Hun. 352), and affirmed by the Court of Appeals, upon the opinion below (148 N. Y. 726), may be considered as controlling in this State. There the insured at the time the policy was issued occupied part of a four story brick building as a hardware store. Other parts of the premises were used for manufacturing a wood filler known as protine made from wood alcohol; the building also contained stored furniture, and a portion of it was vacant. After the policy was issued parts of the building were rented and used as a shoe factory and a box factory, and a forfeiture was claimed for increase of hazard. The referee decided there was no increase, and in this he was sustained by the upper Court. The trouble was that most of the evidence offered by the company was directed to showing that the new use was more hazardous than the hardware business. No effort was made to show that it was more hazardous than the manufacture of wood filler from alcohol or the storage of furniture, both of which were known hazards at the time the policy was issued. The language of the court however leaves little doubt that if there had been a real and substantial increase of hazard shown to exist of which the insured had knowledge, the fact that such hazard originated and existed in parts of the building not under the control of the assured would not have prevented a forfeiture. The court looked more at the character than at the quantity of hazard however.

In other words, the question seemed to be: "Has there been a new use materially more dangerous than any use to which the building was being put at the time the policy was issued?" not, "Has there been an added danger in the shape of a new business, not more dangerous than the existing uses but which increases the hazard on the theory that there are two or more possible causes of fire now where before there was only one?"

(*c*)

MORAL HAZARDS.

I believe I am not far wrong when I assert that to an insistance upon moral hazards as grounds for forfeiture, is largely due the hostile attitude which both courts and juries are too apt to assume towards insurance companies.

Underwriters justify their stand by pointing to the nature of the contract, and the fact that they are to all intents and purposes at the mercy of the assured, and dependent upon his good faith and honesty. He remains in possession of his property. His financial condition; the actual value of the property to him; the existence of secret motives either in himself or others to destroy his property; all these and many other things are or may be known to him, and cannot, in the nature of things, become known to the Company except by chance. Therefore, says the underwriter, "we are justified in defending ourselves both against the temptation of the assured to burn his own property in order to realize its market value, and the equally serious temptation to protect himself at our expense from loss at the hands of enemies, the existence of whom is known to him and unknown to us."

The argument is sound enough, but the difficulty is, it presupposes that the assured will yield to temptation on the one hand and will deliberately deceive the company for his own protection on the other. This presupposition ignores one principle of the common law which we have all lived with, and met at every turn of our lives, until it is instinctively a part of our scheme of life in our association with others. That principle is that every one is presumed to be innocent of wrong doing until his guilt is established by competent evidence. Under our laws, however guilty in fact a man may be of the offense with which he is charged, before he can be required to pay the penalty he must be proved to be guilty. He is not even called upon to defend himself until a *prima facie* case is made out against him in a court of competent jurisdiction. Then the law gives him every chance to prove his innocence, and the benefit of every reasonable doubt.

Yet the underwriter by the terms of his contract in effect says to the insured: "Where you own a building, the ground belonging to another, or where your chattel property is heavily mortgaged and you are hard up or threatened with forclosure, or where you are overinsured, we conclusively presume that you will set fire to your own property, regardless of whether you are in fact honest or dishonest." In other words, "We will presume your guilt without proof and will forfeit your policy as a consequence."

That the one position is directly opposed in spirit to the other, needs no argument, and I believe this inversion of the principle of common law is largely responsible for the hostile spirit with which both courts and juries have treated underwriters.

It is a serious question in my mind whether you would not gain in the end, by stripping your contract of many of the forfeiture clauses, and relying upon the general principle that fraud, however subtle and novel, will, if proved by a fair preponderance of evidence, be a complete bar to a recovery. You would, I believe, find the courts and even juries willing to protect your rights, and their changed attitude would be more efficient in guarding those rights than the plan you have pursued of inserting forfeiture clauses in the policies.

This comment is perhaps not strictly within the subject-matter of this paper. The clauses indicating the several moral hazards which will void the policy, unless consented to by the company, are the law of the state of New York by its adoption of the standard form, and since the clause against increase of hazard is broad enough in language to include both physical and moral hazards, it is necessary for us to determine the limits which have been placed upon its language with respect to moral hazards by judicial construction.

A line of very interesting cases bearing upon the subject will be found in the Texas Reports.

Scottish Union & Nat'l Ins. Co. v. Weeks Drug Co., came before the court of Civil Appeals for the Fourth District (118 S. W. Rep. 1087). The property covered by the insurance was a drug store and its destruction was admittedly the work of an unknown incendiary. The undisputed evidence showed that a few days before the fire an unsuccessful attempt was made by an unknown incendiary to set fire to the building in which the insured property was situated. This attempt was made known to the president of the drug company on the night it occurred, and within a few minutes after it was discovered. Yet the drug

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In other words, the question seemed to be: "Has there been a new use materially more dangerous than any use to which the building was being put at the time the policy was issued?" not, "Has there been an added danger in the shape of a new business, not more dangerous than the existing uses but which increases the hazard on the theory that there are two or more possible causes of fire now where before there was only one?"

(*c*)

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company did not inform the insurance company of the attempt to destroy its property and did nothing to prevent a repetition. The policy contained the identical provision against increase of hazard that is found in the New York Standard form.

In commenting upon the failure of the drug company or its president to notify the insurance company of the incendiary attempt, and in the face of the admission made by Weeks, the president of the company, on the stand, that he believed if he had been five minutes later in discovering the situation the house would have burned up and he believed somebody was trying thereby to burn the building, and that he did not notify the insurance company nor its agent, the court said:

> "We would not undertake to hold that this was a breach of said provision (against increase of hazard), as a matter of law. A continuing danger if known would properly have come within the provision but whether or not a single effort to burn the house would cause one to consider it likely to be repeated until successful would involve a presumption of fact which should always be left to the jury."

The same facts came before the Court of Civil Appeals of the First Supreme Judicial District of Texas, in *Williamsburg City Fire Ins. Co. v. Weeks Drug Co. (132 S. W. Rep. 121)*, and the court there reached the opposite conclusion. They say:

> "The policy of insurance contains the following provision 'This entire policy shall be void if the hazard be increased by any means within the control or knowledge of the insured.' This court is of opinion that under this provision of the policy and the undisputed evidence in the case which establishes the facts before stated, the policy sued on was void at the time the loss occurred and the appellee cannot recover thereon."

The court then commented on the fact that the court of the Civil Appeals for the Fourth District in the Scottish Union & National Ins. Co. case had come to a directly contrary conclusion and certified the Williamsburg City case to the Supreme Court of Texas for final determination.

That court reversed the Williamsburg City case and upheld the doctrine of the Scottish Union case. They construed the policy provision against hazards as applying only to the insured premises or to property under the control of the insured. They held that there is nothing in the language used which would extend it to the property not under his control, and to acts of others,

and that he is not required to keep informed as to the manner in which other persons in the neighborhood use their property, or to communicate the facts to the insurer. They further held that the willful burning of property by a third person is one of the risks against which it is the purpose of the insurance to protect the insured; that it is to be classed with risks arising from mere negligence which are included among the risks insured against, and that it should not be implied that the provision against increase of hazard was intended to exclude such risks from the coverage of the policy.

In *Hartford Fire Ins. v. Dorroh, (133 S. W. Rep. 465)*, the Court of Civil Appeals of Texas, again had a very similar question before them. It was proved that Dorroh a few days prior to the fire had received an anonymous letter to the effect that some merchant below him was moving his goods out at night, and he had better look out. He said nothing about this letter to the company and very shortly after that the building was destroyed by fire. The court held in the first place that the mere receipt of such a letter was not in itself sufficient evidence of an increase of hazard; that the burden would be on the company to show that the facts stated in the letter were true, but it went further and following the reasoning of the prior cases said:

> "Let it be assumed that such facts indicated that an incendiary fire was likely to follow which would endanger, if not destroy, Dorroh's property. Can it be said that this would establish the right to claim the forfeiture insisted upon in this case: We are disposed to think it cannot, for the reason that it would not establish the existence of an increased hazard: within the meaning of this policy. Here the insurer undertakes to indemnify the insured against the possibility of a loss by fire for an agreed consideration paid in advance. The hazard here referred to evidently means the possibility of a loss by fire created by the sum of all dangers resulting from the recognized exposure. It is a matter of common knowledge that accepted insurance risks are graded, and premium rates adjusted, according to the physical conditions and surroundings of the property insured. It is also well known that many fires are of incendiary origin, and that in the transaction of their business insurance companies must take into consideration the dangers arising from that source in estimating the extent of the hazard they assume in all ordinary risks. This is what they call the 'moral hazard.'

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> We think it will hardly be denied that in the same community and among the same class of people, at least, this element may be regarded as a constant factor, entering alike into all insurance contracts and risks taken. Hence it follows that a loss resulting from incendiarism for which the insured cannot be held responsible is one of the dangers against which he secures protection by the general terms of the policy. It is one of the dangers which the company assumes when it makes the contract of insurance, and not one which it may claim arises subsequently and adds to the original hazard. The increased probability of a loss by incendiarism could no more be considered an 'increased hazard' which would avoid the policy than could the increased probability of a fire from any of the physical exposures existing at the time the policy was written."

While the danger from incendiarism may with propriety be considered as a substantial and constant factor in the insurance business as conducted in Texas communities, the New York courts have not yet committed themselves to that view with respect to the morality of our own citizens.

In the *Donley* case (184 N. Y. 107), the plaintiff in his application for the policy asserted that he had no reason to fear incendiarism. The Court of Appeals granted defendant a new trial because the trial court had refused to allow proof of declarations of the assured to the effect that numerous previous fires on his wife's property had been caused by his enemies for the purpose of injuring him. Judge Vann said in the opinion:

> "The moral hazard, to which insurers properly give much heed, was materially increased by the danger that his enemies would destroy his property as they had previously destroyed that of his wife and for the same reason."

It is true that this case turned, not upon the hazard clause, but upon the question and answer in the application considered as a warranty.

It is of interest because it recognizes danger from incendiarism as a moral hazard, and the logical conclusion would seem to be that if an increase of this danger occurred after the policy was issued and became known to the insured, such an increase was within the contemplation of the clause we are considering.

In the *Ampersand* cases however, the Court of Appeals showed a strong inclination to confine increases of hazard which would avoid the policy, to acts done to the property causing an

increase of *physical* hazard which the assured knew of or could have prevented.

The language of Judge Gray was:

> "Ordinarily, we understand, and so the decisions run, that the hazard of insurance is increased when the risk is changed by some new use of, or some other burden placed upon, the property; that is to say, when the physical *status*, or condition, of the subject of insurance is rendered, by some act of the insured, other than what it was when the insurance was applied for and the application acted upon."

Of course if this is to be taken as the last word upon the subject, it would be useless to contend in New York that even such incendiary threats of third parties as occurred in the *Donley* case, constitute increases of hazard, within the meaning of the policy. As moral hazards and not physical hazards they would, by the interpretation given by Judge Gray, not be covered by the policy clause against increase.

In its future consideration of the subject it is doubtful, however, if the Court of Appeals will continue to apply to its fullest extent, the sweeping language of the *Ampersand* decision. There is nothing in the policy itself to indicate that the underwriters intended the clause to apply with any greater force to physical than to moral hazards. It is, as we have seen, a general "Catch-all," occurring in connection with specific increases of hazard which shall avoid the policy, some of which are moral and others physical, and was intended obviously to cover all hazards of either kind, which might thereafter occur other than those in contemplation of the parties at the time the contract was made and the premium fixed.

As Mr. James C. Carter used to say "Nothing is decided until it is decided right." We may live in hopes that some day the Court of Appeals of New York will look upon the opinion of the majority of that court in the *Ampersand* case as an unfortunate misconception of the contract, due to the failure of counsel for the insurance companies to clearly present the question involved.

Our discussion to this point has been confined to things and events viewed as increases of hazard within the knowledge of or control of the assured personally.

The question is still to be answered how far the knowledge of his agents and the acts of such agents and of tenants and other

persons sustaining legal relations with the assured, will be taken to work a forfeiture under the policy.

This paper has already reached such length that a consideration of the cases themselves, some of which are of considerable interest, must be passed over. It may be stated generally that by a preponderance of judicial opinion, including that of the Supreme Court of the United States, and of the Court of Appeals of New York, the assured is responsible for the acts of his duly authorized agents, and the knowledge of the agent acquired while acting within the scope of his authorized employment is to be imputed to the principal. *(L. & L. & G. Ins. Co. v. Gunther, 116 U. S. 113 Cole v. Germania Fire Ins. Co., 99 N. Y. 36).* When it comes to acts of the tenant, the question turns upon the language of the clause. If the acts are such as would be recognized as increases of hazard within the meaning of the policy, if done by the assured himself, and if such acts are known to the assured, the policy will be avoided. And again, if acts of that description are done by the tenant, and if the assured landlord has by the terms of his lease retained authority over his premises by which he could have prevented it, the courts would in all probability hold the policy forfeited. If, on the contrary, the acts of the tenant constituting the increase were unknown to the assured and could not have been prevented by him if known, the resulting increase would not come within the policy condition.

In closing, there is one thing to be remembered in connection with our subject. Increases of hazard, to be available as defenses, must be real and substantial, not imaginary and insignificant. The facts when ascertained should be looked at, not as support for a possible defense, but with a view of determining whether they fairly and clearly show that an unfair advantage has been taken of the company. Every time an insurance company insists upon a hair-splitting defense, it adds to the hostile feeling against underwriters to which I have referred. In a Kentucky case counsel for the company solemnly argued that the property had been insured as a dwelling house; that a dwelling house was defined in his dictionary as a place where people slept; that the house which had been burned contained a kitchen; that people did not usually sleep in kitchens, but fires were constantly kindled there: Hence, the hazard had been increased, and the plaintiff should be nonsuited. In the same state another lawyer insisted that the failure to keep books of account such as are provided for in the iron safe clause, increased the moral hazard of the risk and there should be no recovery.

Needless to say neither defense prevailed, but such misguided efforts as these merely add to our difficulties when we stand before courts and juries to insist upon defenses having real merit.

One more illustration of what I mean when I urge you to disregard immaterial facts even though they may seem to justify a technical forfeiture.

Not long ago I was arguing an appeal based upon the chattel mortgage clause. A large part, but not all of the property insured was covered by a chattel mortgage, and I claimed the insurance was forfeited as to the entire property. The presiding judge put this question to me: "Suppose a man owns $10,000 of chattel property all unencumbered, with the exception of a $250 piano, which he has bought on the installment plan, and on which he has given a chattel mortgage to secure the deferred payments; would the existence of that mortgage, not consented to by the company, forfeit the entire insurance?" The case was of course an extreme one, but I have no doubt every man in this room has considered cases in which chattel mortgages, the existence of which could not by the wildest flight of the imagination be held to increase the moral hazard, could nevertheless be urged as ground for forfeiture under the unqualified language of the policy. The answer is: "The law does not concern itself with trifles" (De minimis non curat lex).

The settled policy of the law is to ignore things of no relative importance, where they are relied upon to defeat or control important legal rights. Some months ago I found a case on a life insurance policy which furnishes an admirable illustration of what I mean. The defense was that the insured, who had been killed in an accident, if I remember correctly, had stated in his application that he had not within a certain time been attended by physicians, whereas the proof showed that within that time, and several years before he had applied for the policy, he had received several visits from a doctor who treated him for a bad cold. The court brushed aside the defense, quoted the maxim I have just referred to, and declared that courts would never consider such trifling and immaterial things where they were sought to be interposed to defeat recoveries under insurance policies.

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